STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

-vs-

NICHOLAS JACKSON,

Defendant/Appellant.
_____/

Supreme Court No.: 125250

C.A. No.: 242050

Circuit Court No.: 01-177534-FC

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125250 Supp Auth

DEFENDANT'S SUPPLEMENTAL BRIEF INFORMING THE COURT OF NEW DISPOSITIVE AUTHORITY FROM THE UNITED STATES SUPREME COURT

** DEFENDANT CURRENTLY SERVING PRISON SENTENCE**

NOW COMES Defendant/Appellant, NICHOLAS JACKSON, by and through his attorneys, MUSILLI, BRENNAN, LETVIN & PARNELL, PLLC, and for his Supplemental Brief Informing the Court of New Dispositive Authority from the United States Supreme Court, states unto this Honorable Court as follows:

1. That the instant criminal matter is the subject of Defendant's Application for Leave to Appeal filed in this Honorable Court on December 16, 2003.

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2. That Defendant was charged with three counts of first degree criminal sexual conduct, and the matter went to trial in the Oakland County Circuit Court in May 2002, resulting in a guilty verdict on all three counts. Further, that Defendant's bond was then revoked, and on May 28, 2002 he was sentenced to twelve to twenty years in prison.

3. That Mr. Jackson filed an Appeal by Right in the Michigan Court of Appeals, but the Court of Appeals affirmed the convictions below in an October 21, 2003 unpublished Opinion.

4. That the alleged victim was Anthony Matthew Hines (hereinafter Anthony Hines), and Anthony's father was Anthony Leroy Hines (hereinafter Tony Hines).

5. That two of the CSC charges arose out of an incident which allegedly occurred at the Hines home during the early hours of the morning. Further, that it was alleged that Tony Hines witnessed the CSC incident. (See "Concise Statement of Proceedings and Facts" in Defendant's Application for Leave to Appeal, [hereinafter "Defendants App."], in particular p. 1-2).

6. That approximately six hours after the alleged incident, and after Tony Hines slept through the night, Tony Hines appeared, by himself, at the Waterford Township Police Department apparently to file a "Complaint" regarding the matter, and at that time he was questioned by an officer Biggs. Further, at that time Tony Hines made various verbal statements to officer Biggs, and he completed a written statement as well. (Defendant's App., p. 1-2, 14-15).

7. That the prosecutor's office did not call Tony Hines to testify at the preliminary examination of the matter, the prosecutor never obtained any sworn statement from Tony Hines, and Tony Hines never gave testimony regarding the matter wherein he was subject to cross-examination by Mr. Jackson. (Defendant's App., p. 3, 7).

8. That Tony Hines died on August 5, 2001.

9. That while Mr. Jackson brought pre-trial motions to prevent the admission of Tony Hines' written testimonial statement, and verbal testimonial statements given to officer Biggs, on the

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grounds that admission would violate the Sixth Amendment right to confront witnesses, and while Mr. Jackson renewed these objections during trial, the Trial Court allowed the admission of the testimonial statements at trial. (Defendant's App., p. 4-5, 7-8). Thus, the ex-parte, unsworn testimonial statements were admitted at trial, without Mr. Jackson ever having the opportunity to cross-examine the declarant, Tony Hines.

10. That the prosecutor was extremely aware of the importance of each witnesses' credibility, as Anthony Hines and Mr. Jackson's respective positions were diametrically opposed, and as there were no eye-witnesses to the alleged incident save the deceased, Tony Hines.

11. That the prosecutor's awareness in this regard is highlighted by the fact that the prosecutor told the jury that Tony Hines' ex-parte, unsworn testimonial statements corroborated Anthony Hines' testimony (Defendant's App., p. 11; Tr. V, p. 25-27).

12. That from the pre-trial stage of the proceedings through his Application for Leave to Appeal to this Honorable Court, Mr. Jackson has always argued that the admission of Tony Hines' testimonial statements violated Mr. Jackson's Sixth Amendment right to confront witnesses, because Mr. Jackson was never afforded an opportunity to confront Tony Hines and subject him to the rigors of cross-examination.

13. That the Trial Court and the Court of Appeals held that admission of the testimonial statements was proper because while they constitute as heresay, they were admissible as exceptions to the heresay rule, because they qualify as excited utterances, or because they fall into the "catch all" heresay exception. (Defendant's App., p. 4-8, 13-19).

14. That on March 8, 2004, the United States Supreme Court issued its Opinion in Crawford v. Washington, 124 S.Ct. 1354, 72 USLW 4229, 4 Cal. Daily OP. Serve. 2017, 2004 Daily Journal D.A.R. 2949 (2004 WL 413301) (**Exhibit A**). (Citations to the Opinion are made to the numbered pages printed as "Page 1" through "Page 22").

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15. That Crawford originated as a Washington State criminal case, and it addresses the admission at trial of a Defendant's wife's out-of-court unsworn statements to police officers, regarding the incident in which her husband allegedly stabbed the victim. (Crawford, at p. 3).

16. That Crawford held that where a party seeks to admit testimonial evidence at trial, the Confrontation Clause of the Sixth Amendment requires both unavailability of the witness, and a prior opportunity for cross-examination of the witness. Crawford, at p. 18.

17. That Crawford also reasoned that statements taken by police officers performing investigative functions qualify as testimonial evidence even under a narrow standard, and that, as such, these statements come under the purview of the Sixth Amendment. Crawford, at p. 10.

18. That Crawford rejected the tendency of many Courts to examine proffered testimonial evidence subject to the rules of evidence and nebulous notions of reliability. Crawford, at p. 15. The Court examined its previous leading case in this regard, Ohio v. Roberts, 448 U.S. 56, 100 S.C.t 2531, 65 L.Ed 2d 597 (1980), and rejected the Roberts rationale, stating: "Roberts conditions the admissibility of all heresay evidence on whether it falls under a 'firmly rooted heresay exception' or bears 'particularized guarantees of trustworthiness'...this test departs from the historical principles identified above in two respects. First, it is too broad: it applies the same mode of analysis whether or not the heresay consists of ex-parte testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the clause. At that same time, however, the test is too narrow: it admits statements that do consist of ex-parte testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations." Crawford, at p. 15 (emphasis in original).

19. That Crawford also discussed one of the fundamental safeguards embodied in the Confrontation Clause, stating "We have no doubt that the courts below were acting in utmost good faith when they found reliability. The Framers, however, would not have been content to indulge this

assumption. They knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people; the likes of the dread Lord Jeffreys were not yet too distant a memory. They were loath to leave too much discretion in judicial hands...By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable, and, while that might be a small concern in run-of-the-mill assault prosecutions like this one, the Framers had an eye toward politically charged cases like [Sir Walter] Raleigh's--great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear..." Crawford at p. 18, (citations omitted.).

20. That the Court interestingly also addressed the question whether statements made to an investigating police officer by a child victim could qualify as "spontaneous declarations", and as such be admitted into evidence as exceptions to the heresay rule. Crawford, p. 13. The Court answered the query in the negative stating "It is questionable whether testimonial statements would ever have been admissible on that ground in 1791; to the extent the heresay exception for spontaneous declarations existed at all, it required that the statements be made 'immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage'" Crawford, p. 13.

21. That Crawford's reasoning regarding spontaneous declarations is instructive in the instant case, because one of the reasoning arguably relied upon by the Circuit Court to allow admission of the testimonial statements was the "Excited Utterance" heresay exception embodied in MRE 803(2). In particular, the grounds upon which to deny admission of the statements at issue is stronger than in the scenario discussed by the Court, because in the instant case the statements were not only unsworn testimonial statements, they were statements made not by the alleged victim, but by an alleged witness, and not immediately after the alleged incident, but made some six hours after the incident. In any event, the notions of reliability attendant to state evidentiary rules do not meet the protection afforded by the

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Sixth Amendment, which commands that the reliability of evidence of the type at issue "[Be] assessed in a particular manner: by testing in the crucible of cross-examination." Crawford, at p. 15.

22. That in the instant case, the Circuit Court allowed the admission of ex-parte, unsworn testimonial statements inculpating Mr. Jackson. Mr. Jackson was never afforded the opportunity to cross-examine the declarant regarding the statements.

23. That admission of the statements at issue clearly violated Mr. Jackson's Sixth Amendment rights, and in so doing forced him to defend against a dead man's contrived, untested and unreliable statements against him.

24. That Mr. Jackson remains in prison serving a sentence based upon a constitutionally infirm conviction.

WHEREFORE, for all of the reasons set forth in this Mr. Jackson's Supplemental Brief, and for all of the reasons set forth in Mr. Jackson's December 16, 2003 Application for Leave to Appeal, Mr. Jackson respectfully requests that this Honorable Court peremptorily reverse the Court of Appeals Opinion affirming his conviction, order the Circuit Court to vacate the conviction, order Mr. Jackson's release from prison, and that the Court remand the matter to the Circuit Court for retrial.

Respectfully submitted,

MUSILLI, BRENNAN,
LETVIN & PARNELL, PLLC

Dated: March 25, 2004

By: _____
Ralph Musilli, P18132
Dennis M. Fuller, P40666

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleading on 3/25, 2004.

By: X U.S. mail ___ FAX ___ Hand delivered ___ Overnight courier
___ Certified mail ___ Other

Signature: Amanda Mil